FOR ARGUMENT

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-439

THE PEOPLE OF THE TERRITORY OF GUAM,
Petitioners,

vs.

EDMUND J. OLSEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS THE PEOPLE OF THE TERRITORY OF GUAM

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Organic Act of Guam Section 22 (48 USC §1424), using acceptable rules of statutory interpretation and legislative intent (where ascertainable) gives to the Territory of Guam sufficient powers of self-government so as to permit its legislature to create an Appellate Court separate from the Appellate Division of the District Court of Guam to which all appeals from the Superior Court of Guam, also cre-

ated by the Legislature of Guam, are to be directed, to the exclusion of the Appellate Division of the District Court of Guam as a court in the appeals chain for local cases heard in local courts.

STATEMENT OF THE CASE

We refer to the statement of the case made in Petitioners' brief, pages 6-7.

ARGUMENT

I

CONGRESS, CONTRARY TO RESPONDENT'S ASSERTIONS, PROVIDED FOR POWER IN THE GUAM LEGISLATURE TO CREATE ITS OWN COURT SYSTEM.

It is respondent's basic contention that the wording of Section 22 of the Organic Act of Guam (48 USC 1424) is inadequate to allow Guam to undertake a reorganization of the local judicial system which creates an Appellate Court with jurisdiction as to local non-federal questions and removes such appellate jurisdiction from the District Court of Guam. Yet, the contrary conclusion is indicated by plain language in the first sentence of the first section of the Organic Act's Judiciary article. It is clearly stated in the initial sentence of section 22 that the judicial authority of Guam shall reside in, ". . . the District Court of Guam *and* in such court or courts as may have been or may hereafter be established by the laws of Guam."

(emphasis added) Thus, the judicial power in Guam is placed in both the District Court of Guam and in courts established by Guam laws without qualification as to local appellate jurisdiction. The authority given to the Guam legislature is not limited to creating inferior courts. It is evident from this statement that courts created by the laws of Guam are to share with equal dignity the judicial authority of Guam. The placement of such language at the onset of the Judiciary article is significant and acts to set the tenor for the remainder of the article.

Utilizing a Byzantine web of interpretations and inferences Respondent seeks to vary the plain meaning of this key statement. This is incorrect. It is a fundamental principle of statutory interpretation to begin with the presumption that a statute should be granted its literal meaning. When a statute uses plain understandable words the court will not employ addition analytical methods. "It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great Northern Railway Co.,* 343 U.S. 562, 575 (1952).

Respondent argues that section 22 does not expressly permit "transfer" of appellate cases from the district court. However, a "transfer" is impossible since the United States Congress never created any appellate jurisdiction within the district court, but permitted the legislature of Guam to determine what, if any, jurisdiction over appeals would lie in the district court.

Respondent's attempt to attribute significance in the instant case to the distinction between the words "transfer" and "determine" fails for a second reason. Section 22, second sentence, third clause, lets the district court "have" such appellate jurisdiction as the "Legislature may determine". Under this clause the legislature can give appellate jurisdiction to the Guam District Court. Since the legislature can give appellate jurisdiction it can also remove it and place it in local courts created by it.

It is the contention of Respondent that subsequent amendments to the Organic Act indicate Congress intended that the appellate power in Guam be vested in the District Court. In 1951 28 USC 1291 was amended to provide that the Ninth Circuit could hear all appeals from the District Court of Guam without regard to the amount in controversy. Then, in 1958 section 22 of the Organic Act was amended by the addition of a paragraph providing that appeals brought in the District Court be heard and determined by an appellate division of three judges.

The amendments do not support the contention that it was the original intent of Congress that the 1950 Organic Act be applied to place the sole appellate power over local courts in the District Court. On the contrary, Congress recognized that it had not adequately anticipated the extent to which Guam would grant appellate jurisdiction to the Appellate Division of the District Court under Public Law 17 of the First Guam Legislature. Congress then reacted as

necessary to service the needs of the systems established by P.L. 17.

Corn v. Guam Coral Company (1963), 318 Fed.2d 622, 627, also cited on page 17 of Petitioner's brief, establishes an accurate picture of the sequence of events and a pattern of Congressional recognition and subsequent reaction which directly contradicts Petitioner's interpretation of original Congressional intent.

> ". . . the appellate division was originally a creation of Guam Public Law 17 of 1951 in response to which section 1291 was amended.
>
> "Thus instead of purporting to create a new appellate body Congress in 1958 was only formalizing the procedural means by which the District Court should exercise its theretofore existing appellate jurisdiction, jurisdiction which antedated the amendment to 28 USC § 1291."
>
> *Corn,* page 627.

The amendments also can not be viewed as a repeal of the power given the Guam Legislature under the Organic Act of 1950 to create an appellate system for the courts of Guam and to determine the jurisdiction of that system. Remaining completely intact is the statutory language which originally enabled the Guam legislature to establish an appellate system:

> ". . . the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam . . . shall have such

appellate jurisdiction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam."

48 USC 1424(a).

The 1951 and 1958 amendments, as indicated above, simply provide that the Ninth Circuit can hear all appeals from the District Court of Guam and that when appeals are sent to the District Court of Guam they shall be heard and determined by the appellate division of the court. There is no statutory requirement contained in the above amendments, or elsewhere, that appeals from the courts of Guam must be determined by the District Court should the Guam legislature decide, as it has in P.L. 12-85 to establish another medium for the appellate process. Therefore, any interpretation that the amendments repeal the power granted under the 1950 Organic Act must be based only upon inference. There is nothing in the legislative history of the amendments to indicate affirmatively a Congressional intent to repeal. In fact, quite the opposite Congressional intent was indicated. (See 2 U.S. Code Cong. and Adm. News—'58, pp. 2623-4 and pages 13-14, 17 of Petitioner's Brief). Thus, in the instant case repeal by implication is not justified by the presence of either clear intent or irreconcilable repugnancy. It is a cardinal rule of statutory construction that repeals by implication are not favored. *Lynch v. Household Finance Corporation* (1972), 406 U.S. 911; *United States v. Students*

Challenging Regulatory Agency Procedures (1973), 412 U.S. 669.

The Organic Act, construed as a whole, provides a scaffolding for the government of Guam, setting up an initial framework for the government by permitting the legislature to change that basic framework as the territory develops. This liberal grant of power is provided not only in regard to the Judicial branch, but also for the Executive and Legislative branches. (See Petitioners' brief, pages 31-33).

Congress, recognizing that the courts would develop along with the rest of the government, allowed the Guam legislature to develop and change the court systems as the needs changed. It is submitted that Guam's enactment in 1974 of the Court Reorganization Act (P.L. 12-85) is simply a part of the general historical impetus toward self-government for Guam which was anticipated and permitted by Congress in 1950. Thus, an interpretation that the 1951 and 1958 amendments, cited by respondent, repeal the power granted in 1950 to establish a local appellate system would result in the elimination of a longstanding Government program.

II

AN INTERPRETATION OF THE ORGANIC ACT OF GUAM AS ALLOWING THE ESTABLISHMENT OF THE SUPREME COURT OF GUAM IS CONSISTENT WITH CONGRESSIONAL INTENT AND SUCH A DETERMINATION WOULD NOT OPERATE TO RENDER THAT ACT UNCONSTITUTIONAL.

Respondent, in support of his contention that Guam's establishment of local appellate jurisdiction contradicts the intent of Congress, cites several bills considered by Congress prior to enactment of the Organic Act which, if enacted, would not have allowed the establishment of such local jurisdiction. The United States House of Representatives considered a bill, H.R. 7273, which would have provided Guam with a supreme court from which decisions would be appealable to an Article Three Court. 2 U.S. Code, Cong. Serv. pp. 2840, 2847 (1950). A letter of May 3, 1949 from the Secretary of the Interior to the President of the Senate states, "The judicial branch would consist of a supreme court, with a single justice appointed by the President, with the advice and consent of the Senate for a 6-year term and of such 'inferior' courts as the legislature might create." (Emphasis added). 2 U.S. Code Cong. Serv. p. 2847 (1950).

Respondent indicates that this bill as amended became the Organic Act of Guam and relies upon it for the proposition that Congress intended to restrict Guam to the creation of inferior courts. Yet, when Congress finally passed the Organic Act the provisions relating to a Congressionally created supreme Court were deleted. When S 1892, the companion bill to

H.R. 7273, came before the United States Senate amendments were proposed which gave up the concept of a Congressionally established Supreme Court of Guam. The Senate adopted these amendments and the House of Representatives then concurred in the amendments. 2 U.S. Code Cong. Serv. pp. 2840, 2842 (1950). It is submitted that the refusal to enact the bill properly leads to a conclusion directly contrary to that proposed by Respondent. In other words, it was not the intent of Congress to disallow the creation by Guam of appellate courts and Congress did not intend to retain control over Guam's appellate courts in regard to local non-federal cases.

One third of Respondent's argument (pages 23-34 of Respondent's brief) is devoted to an analysis of the judicial systems created by Congress for other past and present territories of the United States. Respondent attempts to establish a pattern which he contends prevents Guam from creating local appellate courts. However, a comparison of Guam with other territories establishes that Guam's Organic Act is unique and it delegates the broadest powers of any of the territories to the legislature for the creation of appellate courts.

The former territories of Hawaii and Alaska provide a good illustration of this distinction. The judicial power in the Territory of Hawaii was placed in "one supreme court, circuit courts, and in such *inferior* courts as the legislature may from time to time establish." (emphasis added) April 30, 1900, c. 339 §81, 31 Stat. 157; 48 U.S.C. §631 (1952). The

Hawaiian legislature was empowered only to establish inferior courts. Other provisions of the Act of 1900, which were subsequently eliminated upon the admission of the state of Hawaii into the Union, regulated the appointment, tenure, and salaries of the judges on the supreme court. 48 U.S.C. §632-34 (1952). Also, Alaska could not create courts which were independent of those created by Congress. Alaska had no supreme court prior to statehood, the judicial authority being vested in a district court. Act of June 6, 1900, c. 786, §4, 31 Stat. 322; 48 U.S.C. §101 (1952).

The judicial power in the Virgin Islands is placed in a district court and "in such court or courts of *inferior* jurisdiction as may have been or may hereafter be established by local law." (emphasis added) 48 U.S.C. §1611 (1975). There is no ambiguity as to the vesting of appellate jurisdiction. The district court is explicitly given "appellate jurisdiction to review the judgments and orders of the inferior courts." 48 U.S.C. §1612 (1975). See Petitioner's brief, pages 8-15.

Puerto Rico's first organic act provided for a supreme court and the justices were appointed by the President. Act of April 12, 1900, c. 191, §33, 31 Stat. 84. The second organic act established a United States District Court. While the district court did not have appellate jurisdiction over local courts it did have jurisdiction over local matters concerning non-residents. Act of March 2, 1917, c. 145, §41, 39 Stat. 965, as amended; 48 U.S.C. §863 (1952). The Puerto Rico legislature could not change the jurisdiction of

the district court. Act of March 2, 1917, c. 145, §40; 48 U.S.C. §861 (1952).

Guam is readily distinguished from the territories cited by Respondent. In the case of Guam, Congress has neither created a supreme court nor has it acted to regulate any such court which Guam may establish. In contrast, in the instances of Hawaii and Puerto Rico, Congress has regulated the appointment, tenure, and salaries of supreme court justices. In addition, Guam was provided with the power to create a court system and was not restricted to creating "inferior courts". This differs with the limitations imposed upon the Virgin Islands and Hawaii. Finally, Guam was explicitly provided with the power to create the district court's appellate jurisdiction over local courts in regard to local non-federal cases. No other territory was granted such power. It is submitted, therefore, that if Congress had intended to bar the creation of appellate courts or to prohibit the transferring of appellate jurisdiction from the district court, Congress would have clearly so stated or would have patterned Guam after the other territories.

Respondent contends that an interpretation of Section 22 of the Organic Act as allowing the Guam legislature to create an appellate system for local non-federal questions would render that act unconstitutional. The Court Reorganization Act, P.L. 12-85, does not provide a procedure for review or appeal of Guam appellate court decisions to an Article Three Court. Yet, even prior to the establishment in 1974 of the Guam Supreme Court, the Guam Legislature

had the power under Section 22 of the Organic Act, second sentence, third clause, to "determine" the extent of appellate jurisdiction by the district court over Guam inferior courts. Therefore, before 1974 the right to appeal to an Article Three Court could be extinguished by the Guam Legislature. In addition, it is firmly settled that a right of appellate review is statutory, did not exist at common law, and is not required by the United States Constitution. "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin v. Illinois* (1955), 351 U.S. 12, 18, 76 S.Ct. 585, 590. Moreover, if a gap in appellate review needs to be filled Congress can always so provide. In fact, Congress undoubtedly will *react* upon a final resolution of this case as soon as it knows precisely how existing law is interpreted and what the void is that it must fill. Until that time, Congress cannot know the manner in which it must fill the hiatus in the relationship between the local courts and the United States Court System. It is not the position of Petitioners to advocate a total separation of Guam's local courts from the Article III Courts of the United States. See Petitioner's brief, page 16.

Petitioners concur with the position of the *Agana Bay* majority, which view was also adopted by the *Olsen* dissent.

> "We believe that the policy of leaving local matters to courts created by local legislatures is a sound one. Twenty-five years [now twenty-six years] have passed since Guam was an 'underdeveloped and isolated possession of the United

States' as described by the district court. There is nothing to indicate that Guam is incapable of establishing and operating its own appellate court with respect to purely local matters. There is nothing in the language or legislative history of the Organic Act requiring the interpretation that the district court must be the highest and only appellate court in Guam. Rather, the only language pertaining to appellate courts grants the Guam Legislature total authority to transfer appellate jurisdiction over local, non-federal cases from the district court to Guam courts."

Agana Bay Development Company v. Supreme Court of Guam (9th Cir. 1976), 529 F.2d 952, 958.

III

CONTRARY TO ASSERTIONS OF AMICUS, PUBLIC LAW 94-584, TO PROVIDE FOR THE ESTABLISHMENT OF CONSTITUTIONS FOR THE VIRGIN ISLANDS AND GUAM, DOES NOT SHOW CONGRESSIONAL INTENT RELATIVE TO THE ORIGINAL ORGANIC ACT.

The *Amicus,* Guam Bar Association, asserts that the Guam ConCon Act (*Amicus'* Brief, page 3), requires that Guam follow the pattern established by the Organic Act of the Virgin Islands. This cannot be, since this would place subsections 2(b)(6) and 2(b)(7) in absolute conflict. If Guam is to follow the revised Organic Act of the Virgin Islands, then there is no necessity for any further determination of the relationship between the local courts of Guam and the federal judicial system, because the revised

Organic Act of the Virgin Islands already provides for such relationship. Further, Guam's courts have never followed the pattern established for the Virgin Islands, and there is no reason to expect they should now do so as this would be a step backwards, even assuming the Court Reorganization Act here in question had never been passed.

The purpose for subsection 2(b)(7) is stated in the following message from Congressman Won Pat to the Attorney General. This was requested since the legislative history of the Guam ConCon Act is entirely silent as to Guam. The published reports concern only the Virgin Islands, as the Guam portion of the bill was merged into the Virgin Islands bill apparently on the floor of the Senate after all hearings had been completed. This message states:

"Date: December 13, 1976

From Mr. Won Pat: for Charles Troutman
Re: PL 94-584, Sec. 2(b)(7),

Provide for the establishment of a system of local courts the provisions of which shall become effective no sooner than upon the enactment of legislation regulating the relationship between the local courts of Guam with the Federal judicial system. There is no written record explaining the inclusion of this subsection other than that it first appeared in the Senate version of the House passed measure. According to the attorney in the Senate Territories Subcom. who drafted the language, then Sec. 2(b)(6) of H.R. 9491, the subsection was added at the oral suggestion of Herman Marcuse of the Dept. of Justice, who had drafted the recommendation of the Dept. of

Justice on the Guam Supreme Court bill, H.R. 4580, and with whom my office had been in contact occasionally so that Marcuse was aware of the *Agana Bay & Olsen* decisions. Marcuse suggested to the attorney, James Bierne, that the House passed version implied that the local court system as described in the Guam constitution would be effective upon final ratification of the constitution, but that the local system would fail any constitutional test similar to *Olsen* unless it were made clear in the concon bill that the Congress was aware that legislation establishing review of the decisions of the highest local court by an Article III court would have to be enacted sometime prior to the final ratification of the Guam constitution or else the local court system could not be implemented. Bierne thought that such federal legislation could either be by a Guam Supreme Court bill, such as H.R. 4580 (amended as necessary) or by means of language in any joint resolution dealing with the Guam constitution draft. Bierne suggested that it was his feeling that some action would be necessary at the time the constitution draft came to the Congress in order to repeal all sections of the Organic Act dealing with local government (both consistent and inconsistent sections), in order that litigation raising questions of interpretation of the Guam Constitution would have to come up through the local court system (based on the Guam Constitution) rather than through the Federal court system (based on a parallel or conflicting Federal statute)."

As can be seen, the purpose of subsection 2(b)(7) was not a reflection on the original Organic Act, nor

on the Court Reorganization Act of 1974 (Guam Public Law 12-85), but a reaction to the Ninth Circuit decision in this case.

Therefore, this Guam ConCon Act should not be considered by this court in this case.

IV

HEARINGS ON THE ORIGINAL ORGANIC ACT HELD IN GUAM IN 1949 SHOW THAT, WHILE NO CONSENSUS ON THE COURT SYSTEMS EXISTED, DEFINITE OBJECTIONS TO THE ORIGINAL PROPOSALS WERE GIVEN.

Judge Fischer, then Judge of the Superior Court (a post created by executive action of the Governor and supported by the advisory Guam congress and which handled all United States questions before 1950) proposed, at hearings held in Guam by the House Subcommittee on Public Lands, on the 22nd of November, 1949, that appellate rights from local courts go to the Ninth Circuit directly and thence to the United States Supreme Court. At the end of Judge Fischer's lengthy statement, Representative Lemke responded by suggesting a rewrite of H.R. 4499 (one of the original Organic Act bills) so that a supreme court with inferior courts created by the Guam Congress would hear all local questions. The decision of the Supreme Court of Guam would be final as to local issues. Federal issues would be decided by some federal district court organization. [Original transcript of "Second Day of Public Hear-

ing" by the House Subcommittee on Public Lands, Agana, Guam, Tuesday, November 22, 1949; pages 73 through 78. Obtained from mimeograph of original transcript held by Msgr. Calvo of Agana, Guam. Official citation unavailable at this time.]

Neither proposal was eventually accepted by Congress. Rather, Congress adopted section 22 of the Organic Act, which established a District Court of Guam having exclusive federal jurisdiction and such local jurisdiction as would be determined locally, until a local court system could be established according to the wishes of the people of Guam.

CONCLUSION

The arguments of *Amicus* and Respondent do not coincide with the actual facts of the situation. Congress deliberately failed to pass the initial proposals for a Guam Organic Act. Likewise, the Guam ConCon Act was adopted in reaction to this case as decided by the Ninth Circuit Court. Other acts of Congress relative to the Guam Judiciary have all been taken in reaction to local needs.

Therefore, it can be seen that the legislative intent in the original Organic Act, if any such intent can be found, was to give Guam the maximum flexibility in determining its own court system, which system would have equal dignity with that of the District Court of Guam in *all* local matters.

Petitioners urge that this Court reverse the opinion of the Ninth Circuit Court of Appeals in the instant case.

Dated, Agana, Guam,
March 19, 1977.

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